

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE SALE, RESALE,)
AND OTHER PROVISIONS OF INTRASTATE)
TELECOMMUNICATIONS SERVICES) PSC REGULATION DOCKET NO. 10
(OPENED MAY 1, 1984; REOPENED)
NOVEMBER 17, 1998; REOPENED JULY 24,)
2001; REOPENED AUGUST 9, 2005))

IN THE MATTER OF THE DEVELOPMENT OF)
REGULATIONS FOR THE FACILITATION OF)
COMPETITIVE ENTRY INTO THE TELECOM-) PSC REGULATION DOCKET NO. 45
MUNICATIONS LOCAL EXCHANGE SERVICE)
MARKET (OPENED NOVEMBER 21, 1995;)
REOPENED NOVEMBER 17, 1998; REOPENED)
JULY 24, 2001, REOPENED AUGUST 9,)
2005))

ORDER NO. 6690

This 9th day of August, 2005, the Commission determines and Order the following:

A. BACKGROUND AND SUMMARY

1. More than three years ago, this Commission adopted its "Rules For The Provision of Competitive Intrastate Telecommunications Services," a set of unified regulations applicable to most, but not all, telecommunications carriers providing telecommunications services in Delaware.¹ Those Rules include not only criteria related to the initial certification but also explain how the Commission will supervise carriers' offerings and prices. In some cases, the Rules require different presentations or impose differing duties, depending

¹See PSC Findings, Opinion, and Order No. 5833 (Nov. 6, 2001) (adopting such "Telecom Rules"). The Telecom Rules do not apply to carriers electing regulation under the Telecommunications Technology Investment Act, 26 Del. C. §§ 704-11 (2004 Supp.). Thus, Verizon Delaware Inc. is not currently governed by the Telecom Rules.

on the category of services to be offered by the carrier (for example, local exchange or interexchange). In other instances, the Rules apply across the board.

2. By this Order, the Commission now proposes to make two amendments to those Telecom Rules. Both changes are mostly administrative. The first proposed revision will enable telecommunications carriers to utilize the banking device of a stand-by "Letter of Credit" ("the Letter") as the security instrument to ensure both the carrier's performance and the availability of funds to remit its customers' prepaid deposits. Under the current Rules, the carrier must guarantee both its performance and its refunds by filing a bond executed by a Delaware surety. By the second change - more substantive in nature - the Commission proposes to forebear from enforcing the provisions of 26 Del. C. § 215(a) & (b) in the case of those telecommunications carriers that have been certificated for at least a year but have little Delaware revenues. If so "qualified," such carrier would no longer have to obtain Commission approval for its financings, mergers, or transfers of control. However, under the proposal, the exemption is not absolute. The proposed forbearance would not extend to carriers offering local exchange and exchange access voice services, and would not apply where a contemplated merger or transfer of control involves another carrier with significant Delaware earnings.

B. AUTHORITY FOR AMENDMENTS

3. The Commission is generally empowered to promulgate regulations governing the operations of public utilities. See 26 Del.

C. § 209(a)(1). In addition, the Commission is empowered to grant Certificates of Public Convenience and Necessity to public utilities, including telecommunications carriers. See 26 Del. C. § 203(A)(a), (b) (3)-(5). Moreover, since 1992, the Commission has been authorized to adopt alternative forms of regulation for telecommunications carriers, including both de-tariffing and deregulation. See 26 Del. C. § 703(3)(2004 Supp.).

C. "LETTER OF CREDIT" ALTERNATIVE

4. Under the present Telecom Rules, a telecommunications carrier must file as a condition of its certification, and must maintain during its operations, a \$10,000 performance bond executed by a Delaware surety. That bond is to be renewed annually. Telecom Rule 4(f)(i). Similarly, if a carrier will require its customers to pay a deposit or make any form of advance payment, the carrier must initially file a bond, issued by a corporate surety licensed to do business in this State, guaranteeing the repayment of all such customer deposits and advances. Telecom Rule 4(f)(ii).²

5. Recently, several carriers have requested waivers from the requirement to file a surety bond to guarantee their performance or their repayment of customer deposits. Those carriers report that corporate insurers often refuse to stand as sureties on such

²This advance deposit bond must secure repayment in the amount of the greater of either 150% of the projected balance of such deposits at the end of three years or \$50,000. If at any time during the carrier's operations its deposits exceed the bond amount, the carrier must submit a new bond in an amount to cover the higher pre-paid deposit balance. After three years, a carrier may obtain a waiver of the advance payment bond obligation by establishing sufficient financial resources to insure repayment of the deposits or advance payments held by the carrier.

commitments or charge carriers extremely high premiums for such guarantee instruments. See e.g., PSC Order No. 6437 at ¶¶ 1 & 3 (June 22, 2004) (Commission waives surety bond requirement in favor of stand-by Letter to secure carrier's performance obligations).

6. The Commission now proposes to amend Rule 4(f) to add a new subparagraph (iii). The new subparagraph would allow telecommunications carriers to fulfill security obligations imposed by Rule 4(f)(i) or Rule 4(f)(ii) (or both) by use of a banking instrument: an irrevocable stand-by Letter of Credit. The Letter would be an alternative to the carrier filing the otherwise required insurance instruments - bonds with Delaware sureties. However, the Letter alternative would track the requirements for a surety bond. The amount payable under the Letter would have to be equivalent to the level of bond guarantee required by either Rule 4(f)(i) or Rule 4(f)(ii). Also, the Letter must be consistent with the provisions of 6 Del. C. §§ 5-101 through 5-117.³ The Letter must name the Commission as its beneficiary and authorize draws on presentation of a Commission Order, ruling, or decision finding or reciting that the carrier is liable for a monetary amount due to its failure to comply with applicable rules or statutes or that the carrier is obligated to make refunds of deposits on advance payments to its customers. The Letter must be issued by a bank or other entity doing business in Delaware, or, if not, be subject to an agreement by a confirming bank doing

³The Letter would have to include a "choice of law" provision agreeing that Delaware law would govern the relationship between the issuer and the Commission as the Letter's beneficiary.

business in Delaware that the confirming bank will honor the Letter issued by the other bank or entity.⁴

7. The text of this amendment to allow such Letters is set forth in Exhibit "A" as a new Rule 4(f)(iii) subparagraph. The Commission believes that the public interest will be served by allowing such an alternative form of security. While not a true guarantee, the Letter seemingly provides similar assurances that monetary amounts will be available in case of defaults by carriers. Indeed, in contrast to bonds where the surety can avail itself of various defenses held by the carrier, the Letter creates an independent obligation for the issuing entity to pay if the called-for documents are presented. Moreover, by allowing another security device, more carriers may be able to meet, without additional delay and cost, the requirements of Rule 4(f)(i) or (ii).

**D. FORBEARANCE FROM § 215(a) AND (b) OBLIGATIONS
FOR CERTAIN NON-LOCAL EXCHANGE TELECOMMUNICA-
TIONS CARRIERS WITH LIMITED INTRASTATE REVENUES**

8. As a second amendment, the Commission proposes to include within Rule 10 of the Telecom Rules a new subparagraph by which the Commission will lift, in the case of certain certificated telecommunications carriers, the statutory obligation to seek and obtain Commission approval for certain transactions. See 26 Del. C. § 215(a) and (b). Under such forbearance exemption, "qualifying" telecommunications carriers would not need to file applications to gain approval to issue or assume long-term securities and debt

⁴This requirement parallels the present requirement that the surety on a bond must be one licensed to do business in this State.

obligations, to dispose of utility assets, or, in some situations, to merge. See 26 Del. C. § 215(a)(1)-(3). Similarly, the qualifying carrier would not, in many situations, have to seek approval for transfers in its ownership or its acquisition of other carriers. See 26 Del. C. § 215(b). Rather, the qualifying carrier would only have to report such merger or transfer of control in its year-end Annual Report filed under Rule 10(a) of the Telecom Rules.

9. The above forbearance would apply only to telecommunications carriers fulfilling all the following criteria:

- (a) the carrier is currently certificated to provide intrastate telecommunications services and has held such certification for at least one year;
- (b) the carrier does not provide or offer local exchange or exchange access voice services (see Telecom Rule 8) in Delaware;
- (c) the carrier earned less than two and one-half million dollars (\$2,500,000) in annual gross intrastate revenues as reported in the carrier's last timely filed annual gross revenue return (26 Del. C. § 115(e)); and
- (d) the carrier's principal operations' office is not located in Delaware.

Thus, the forbearance exemption will not apply to any carrier offering local exchange voice services, regardless of its annual intrastate operating revenues. A carrier offering such voice services will have to continue to comply with the § 215 filing and approval regime. The Commission desires to track ownership of such carriers in light of the network access services being provided. For the same reason, the exemption will not apply to a carrier who operates its network from a

principal place of business in Delaware.⁵ If the carrier has its operations headquartered in Delaware, the Commission believes it appropriate to track its financial dealings and its owners. The revenue qualifier is triggered by looking to the "annual gross intrastate revenues" reported in the carrier's relevant annual gross return filed by the carrier. If a carrier has not timely submitted such a return reporting its revenues for the prior year, the exemption is not available.

10. At the same time, the forbearance proposed to be granted to qualifying carriers does not extend to all transactions covered by § 215(a) and (b). If a transfer of control (§ 215(b)) or a merger (§ 215(a)(1)) involves another certificated carrier - as either the acquired or acquiring entity - and such other entity is not a "qualifying" one, then the statutory provisions must be followed. Similarly, if the transfer of control or merger transaction (regardless of the other carrier) will result in the dissolution of the qualifying carrier or the creation of a new carrier, then the qualifying carrier must still file a petition for abandonment and the new resulting entity must still seek certification as a carrier.⁶

11. The Commission recognizes that the § 215(a) and (b) filing and approval obligations are ones imposed by statute; they are part of the Public Utilities Act of 1974. However, in 1992, the General Assembly and

⁵For a similar reason, the exemption is not available until a carrier has been certificated for one year. The Commission desires to have the opportunity to know both who controls a newly certificated carrier and what financial obligations such a new carrier is assuming during its first year of certification within this State.

⁶See 26 Del. C. § 203A(a) (certification), (c) (abandonment).

Governor, in the "Telecommunications Regulatory Authorization Act of 1992,"⁷ granted this Commission the ability to respond to the changing structure of the telecommunications industry by modifying the regulation of telecommunications services in cases where such modification might "promote efficiency in public and private resource allocation." The Commission believes that the elimination of most of the § 215(a) and (b) obligations for non-local exchange carriers with less than \$2,500,000 in annual intrastate gross revenues will serve such goal of the efficient use of resources. The proposed change lifts not only from qualified carriers, but this Commission, the burdensome - and really no longer useful - reporting and approval requirements.⁸ Moreover, a large part of the § 215(a) duty to obtain Commission approval for certain transactions can be traced to a component of the Commission's exercise of rate regulation under a cost-of-service, rate of return regime. However, by the Telecom Rules, this Commission lifted the latter type of rate regulation regime from most of the carriers covered by those Rules. In fact, the Commission has already granted to carriers governed by those Rules relief from other statutory filing obligations that historically accompanied such cost-of-service supervision.⁹

⁷26 Del. C. § 703(3) (2004 Supp.).

⁸In current practice, the Commission allows many § 215 applications filed by certificated carriers with no or only minimal business in Delaware to be "deemed approved" without any affirmative action by the Commission. See 26 Del. C. § 215(d).

⁹See Rule 5(a)-(c) (allowing use of price lists in lieu of tariffs; allowing services to be introduced on 10 days notice and price changes to be made on 3 days notice); 5(d) (upon Commission investigation, a carrier must establish that price or rate is expected to cover the incremental cost of providing the service).

12. The text of the proposed amendment granting such forbearance to qualified carriers is set forth in Exhibit "B" as new subsection (e) to Rule 10 of the Telecom Rules.

Now, therefore, **IT IS ORDERED:**

1. That, pursuant to 26 Del. C. §§ 209 and 703(3), the Commission proposes to amend Rule 4(f) and Rule 10 of its "Rules for the Provision of Telecommunications Services" (initially adopted by PSC Findings, Opinion, and Order No. 5833 (Nov. 6, 2001)). The proposed amendment to Rule 4(f) is set forth in Exhibit "A" to this Order; the proposed amendment to Rule 10 is set forth in Exhibit "B".

2. That, pursuant to 29 Del. C. §§ 1133 & 10115, the Secretary shall transmit a copy of this Order, with the attached exhibits, to the Registrar of Regulations for publication in the Delaware Register of Regulations.

3. That, pursuant to 26 Del. C. § 209 and 29 Del. C. § 10115(a)(2) & (b), the Secretary shall cause the form of public notice attached as Exhibit "C" to be published in two-column format, outlined in black, in the following two newspapers on the following dates:

The News Journal (August 29, 2005)

Delaware State News (August 30, 2005)

The Secretary shall also ensure, pursuant to 29 Del. C. § 10115, that a copy of such notice is sent to the Registrar of Regulations for its publication in the Register of Regulations. In addition, the Secretary shall mail a copy of this Order, with its exhibits, to the Division of the Public Advocate and to all persons or entities who have made

written requests for advanced notice of this Commission's rule-making proceedings. The Secretary shall file a certification of the completion of these tasks by September 16, 2005.

4. That interested persons or entities may submit written suggestions, compilations of data, briefs, or other written materials concerning these proposed amendments on or before Friday, September 30, 2005. Pursuant to 26 Del. C. §209(a), the Commission, through its designated Hearing Examiner, will hold a public hearing on the proposed amendments on Wednesday, October 19, 2005, beginning at 10:00 AM in the Third Floor Conference Room of the Carvel State Office Building, 820 North French Street, Wilmington, Delaware.

5. That, pursuant to 26 Del. C. § 502 and 29 Del. C. § 10117, the Commission designates Hearing Examiner Ruth Ann Price to organize, classify, summarize, and make recommendations concerning the rule changes proposed by this Order in light of the submitted materials and public hearings. Hearing Examiner Price is specifically authorized to conduct further hearings or direct submission of additional documents if deemed necessary or appropriate.

6. The Commission reserves the jurisdiction and authority to enter such further orders in this matter as may be deemed necessary or proper by Order of the Commission.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

Vice Chair

PSC Regulations Dockets Nos. 10
and 45, Order No. 6690 Cont'd.

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary

E X H I B I T "A"

PROPOSED MODIFICATIONS TO RULE 4(f) OF THE
"RULES FOR THE PROVISION OF
TELECOMMUNICATIONS SERVICES"

(added language in italics)

Rule 4. Certification.

. . .

(f) Bonds.

(i) Performance Bonds.

All applicants must post a \$10,000 performance bond with Delaware surety and renew such bond annually.

(ii) Carriers requiring deposits, or any form of payment in advance for service.

No Carrier shall require its customers in Delaware to pay a deposit or pay or otherwise provide any security or advance as a condition of service unless that Carrier first has filed with the Commission a bond, issued by a corporate surety licensed to do business in Delaware, guaranteeing the repayment of all customer deposits and advances upon the termination of service. The bond need not be filed with the application, but no CPCN will be issued until such bond is filed with the Commission. The amount of the bond shall be the greater of: (A)

150% of the projected balance of deposits and advances at the end of three years of operation; or (B) \$50,000. If at any time the actual amount of deposits and advances held by a Carrier exceeds the bond, then the Carrier promptly shall file with the Commission a bond with surety to comply with the requirement of the preceding sentence. A Carrier may petition for waiver of the bond requirement three years from the date the certificate was issued and such waiver will be granted upon a demonstration of an adequate operating history and financial resources to insure the repayment to customers of any advance payments or deposits held.

(iii) In order to comply with Rule 4(f)(i) or 4(f)(ii), an applicant or carrier may file an irrevocable stand-by Letter of Credit in lieu of a bond executed by a Delaware corporate surety. Such Letter of Credit shall:

- (A) allow a draw or demand against such Letter in the amount prescribed by Rule 4(f)(i) or 4(f)(ii);*
- (B) be irrevocable, and not subject to modification, except upon the consent of the Commission;*

- (C) be issued by a federal or state chartered financial institution which does business in Delaware or be subject to an agreement with a confirming bank doing business in Delaware that such confirming bank will honor drafts or demands under such Letter;
- (D) be consistent with the provisions of 6 Del. C. §§ 5-101 through 5-117 and include terms that make Delaware law govern the relationship between the issuer and the Commission as beneficiary;
- (E) name the Commission as the beneficiary under such Letter; and
- (F) contain terms obligating the issuer to honor demands upon presentation of an Order, ruling, or decision from the Commission which finds, determines, or reports that the carrier is: (1) liable for a specified monetary sanction for its failure to perform an obligation imposed by the Public Utility Act, a Commission rule or regulation, or an Order of the

*Commission (Rule 4(f)(i)); or (2) is
liable to refund an amount
representing prepaid deposits or
advances paid by customers of the
carrier (Rule 4(f)(ii)).*

*The form and terms of the Letter of Credit shall
be subject to approval by the Commission Staff.*

PROPOSED AMENDMENT TO RULE 10 OF THE
"RULES FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES"
(additional text in italics)

(a) Annual and Periodic Reports.

- (i) the same after-the-fact information that management is provided concerning the measurement of performance provided in Delaware;
- (ii) the information used to determine Delaware income tax liability;
- (iii) financial and operating information for the smallest management unit that includes Delaware;
- (iv) intrastate revenues (net of uncollectible) by service category;
- (v) intrastate access and billing and collection cost by service category;

- (vi) total number of customers by service category;
- (vii) total intrastate minutes of use by service category;
- (viii) total intrastate number of calls by service category;
- (ix) a description of service offered;
- (x) a description of each complaint received by service category (in the form of a single Complaints Log); and
- (xi) verification of deposits, customer advances, the bond requirement and the bond with surety, where applicable.

(b) Accounting System.

All Carriers shall use an accounting system in accordance with Generally Accepted Accounting Principles or such other uniform system of accounts previously approved in writing by the Chief of Technical Services of the Commission.

(c) Attestation.

All Carriers shall file all reports required by these Rules with a sworn statement by the person under whose direction the report was prepared, that the information provided in the report is true and correct to the best of the person's knowledge and belief.

(d) Time for Filing.

All periodic reports to be filed with this Commission must be received on or before the following due dates, unless otherwise specified herein, or unless good cause is demonstrated by the Carrier:

- (i) Annual Report: one hundred twenty (120) days after the end of the reported period; and
- (ii) Special and additional reports: as may be prescribed by the Commission unless good cause to the contrary is demonstrated.

(e) Forbearance from Filing Applications for Approval
Under 26 Del. C. § 215(a) and 215(b)

- (i) A qualified carrier (as defined below) need not file an application for approval of the financial and asset transactions set forth in 26 Del. C. § 215(a)(1), (a)(2), or (a)(3);
- (ii) Except in the case of transactions described below, a qualified carrier (as defined below) need not file for approval of mergers or consolidations under 26 Del. C. § 215(a)(1) or for transfers of control under 26 Del. C. § 215(b). However, if the other entity involved in such proposed transaction is a carrier certificated in this State that, in the preceding year, reported annual gross intrastate revenues of \$2,500,000 dollars, a qualifying carrier must

continue to file an appropriate application for merger or transfer of control under 26 Del. C. § 215(a)(1) or 215(b). An entity is involved in the transaction if:

- (A) it is a party to the merger agreement;
- (B) it is the entity to be acquired in the merger or transfer of control by the qualified carrier or its corporate parent;
- (C) it is the entity acquiring the qualified carrier; or
- (D) it will, as a result of the transaction, be owned by the same corporate owner as the qualified carrier.

(iii) A qualified carrier is a carrier:

- (A) that does not provide or offer local exchange and intrastate exchange access voice services;
- (B) that is currently certificated and that has held such certification for at least one year;
- (C) that had less than \$2,500,000 in annual gross intrastate revenues, as reported in the carrier's timely filed

*Annual Gross Revenue return submitted
under 26 Del. C. § 115(e); and*

*(D) that does not operate its network from
a principal place of business in
Delaware.*

*(iv) A qualified carrier shall include in its Annual
Report under Rule 10(a), the date and nature
of any mergers or transfers of control occurring
during the preceding calendar year.*

*(v) If any transfer of control, merger, or other
similar transaction shall result in the change of
the corporate, or trade, name of the certificated
qualified carrier, the qualified carrier must
file, within 10 days after such transaction, a
statement identifying the new name of the
certificated carrier.*

*(vi) The forbearance from filings granted by Rule
10(e)(i) and 10(e)(ii) do not relieve any carrier
of the obligation to file for abandonment of
service under 26 Del. C. § 203A, nor does such
forbearance remove the obligation that any new
entity created by a merger, transfer of control,
or other transaction obtain a Certificate of
Public Convenience and Necessity from the
Commission.*

E X H I B I T "C"

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

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MARKET (OPENED NOVEMBER 21, 1995;)
REOPENED NOVEMBER 17, 1998; REOPENED)
JULY 24, 2001; REOPENED AUGUST 9,)
2005))

**PUBLIC NOTICE OF PROPOSED AMENDMENTS TO THE
PUBLIC SERVICE COMMISSION'S
"RULES FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES"**

**TO: ALL TELECOMMUNICATIONS CARRIERS, ALL
CONSUMERS, AND OTHER INTERESTED PERSONS**

In 2001, the Public Service Commission ("PSC ") adopted "Rules for the Provision of Telecommunications Services" ("Telecom Rules") to govern its regulatory oversight of telecommunications carriers operating within Delaware. Those Rules apply to all current telecommunications carriers, except Verizon Delaware Inc.

By PSC Order No. 6690 (Aug. 9, 2005), the PSC now proposes to amend Rule 4(f) and Rule 10 of those Telecom Rules. The proposed change to Rule 4(f) will allow telecommunications carriers to submit irrevocable stand-by Letters of Credit as a substitute for the

filing of surety bonds currently required under Rule 4(f)(i) & (ii). Such Letters of Credit, like the now required bonds, will provide financial assurances that carriers will pay financial liabilities for inadequate performance (Rule 4(f)(i)) and that sufficient funds will remain available in case refunds of customer deposits and prepaid monies might be required (Rule 4(f)(ii)). The proposed amendment to Rule 10 will allow a "qualified carrier," one with less than \$2,500,000 in annual gross intrastate revenues in the preceding year, to forego filing most of the financial, merger, and transfer of control applications now required by 26 Del. C. § 215(a) & (b). The exemption will not apply to local exchange carriers, will not be available during the first year after the carrier's certification, and will not apply to mergers or acquisitions involving another carrier with more than \$2,500,000 in annual gross Delaware revenues.

The text of these proposed amendments are attached to PSC Order No. 6690. That Order and the exhibits are reproduced in the September 2005 edition of the Delaware Register of Regulations. The Order and exhibits can also be reviewed on-line at the PSC's website at www.state.de.us/delpsc. You can also obtain a paper copy of the Order at the PSC's Dover office. Those paper copies will cost \$0.25 per page.

You can file written comments, suggestions, briefs, compilations of data, or other materials concerning these proposed amendments to the Telecom Rules. Such material (10 copies) must be submitted to the Commission on or before Friday, September 30, 2005.

Send the material to the Commission's Dover office at the following address:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building
Suite 100
Dover, Delaware, 19904
Attn: PSC Reg. Dckts. Nos. 10 & 45

In addition, the PSC will conduct a public hearing on these proposed changes on Wednesday, October 19, 2005, beginning at 10:00 AM. The hearing will take place in the Third Floor Conference Room of the Carvel State Office Building, 820 North French Street, Wilmington, Delaware. You can submit additional materials then.

If you are handicapped and might need assistance or aids in participating in this matter, please contact the PSC to discuss the needed assistance or aids. You can contact the PSC with questions or requests about this matter at the Commission's toll-free telephone number (800) 282-8574 (Delaware only) or (302) 739-4333 (including text telephone). You can also send inquiries by Internet e-mail addressed to karen.knickerson@state.de.us.